IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR MONTGOMERY COUNTY, MARYLAND, AS AMICUS CURIAE

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PRELIMINARY STATEMENT

The Respondents, except Richard McIntyre, in their Brief on the Merits have challenged the legality of the Montgomery County Commission on Human Relations, and by virtue of this challenge have sought to impugn the administrative opinion, findings of fact,

conclusion of law, decree and final order [1] out of which this controversy arises. The Respondents in their Brief also seek to convince this Court that they hold the "special exception" under which they operate their swimming pool facility by right, and that, therefore, they do not have nor ever had a commitment not to discriminate on the basis of race. Because of the inaccuracies which are raised by the two aforementioned propositions, this Reply Brief is filed.

ARGUMENT

I.

The Montgomery County Commission on Human Relations Is a Legally Constituted Local Administrative Agency

The Respondents charge that the Montgomery County Commission on Human Relations is illegally constituted and, therefore, the administrative processes of one of its Panels should be ignored. The local agency is not a "rump body" nor are its findings "false". The local legislation which created the Montgomery County Commission on Human Relations was enacted during an "executive session" of the Montgomery County Council on January 16, 1962 (Ordinance No. 4-120) (A. 143). Thereafter, the local agency was established and operated. Periodically, its enabling legislation was amended. Amendments were always enacted into law during "executive session" of the County Council. In 1968, part of the Human Relations laws were challenged. This challenge resulted in a decision by the Maryland Court of Appeals that that part of the County Human Relations laws which dealt with "fair housing" could not be enacted during "executive session" but had to be enacted in "legisla-

[1] Reproduced as Appendix A to Brief on the Merits for Montgomery County, Maryland, as *Amicus Curiae*.

tive session" by the County Council. *Scull* v. *Montgomery Citizens,* 249 Md. 271, 239 A.2d 92 (1968). It was upon the authority of *Scull* that the Circuit Court for Montgomery County, Maryland, found that the "public accommodations" part of the Human Relations Laws were also invalid (A. 144-148). *Montgomery County* v. *Elliott,* Equity No. 36124 (In the Circuit Court for Montgomery County, Maryland, filed September 12, 1969). The "fair housing" and "public accommodations" laws had been enacted as separate ordinances.

The administrative investigation and proceedings out of which the instant controversy arises occurred in early 1969; the agency's Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order were rendered on May 29, 1969. It was during the *Elliott* controversy that the instant controversy was progressing through the administrative process. On October 7, 1969, immediately after the *Elliott* decision, legislation was introduced before the Montgomery County Council in "legislative session" to re-enact the "public accommodations" law. (Bill No. 46-49, County Council for Montgomery County, Maryland (September Legislative Session 1969)). The new "public accommodations" law, with certain improvements, was enacted and became effective on November 4, 1969.

It is clear that the enactment of the Human Relations laws during "executive session" constituted a technical defect which was "cured" by the re-enactment of the laws during "legislative session" on November 4, 1969. This type of legislative mistake is not unusual, as unfortunate as it may be, and the subsequent re-enactment of the laws validated the previous

actions by the local agency. One of the leading treatises on statutory construction recognizes this and comments:

> "A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting." 2 Sutherland Statutory Construction, Sec. 2213 (3d ed. 1943).

And:

> "The corporate existence and the legislative and administrative acts of municipal corporations, including cities and towns, school districts, drainage districts, townships and counties may be validated by properly enacted curative statutes. Because there is apparent legislative cognizance of the fact that most political subdivisions must be administered by personnel unfamiliar with the intricacies of the law, and because courts generally afford liberal interpretation to action taken for the public benefit, there is a mutual legislative and judicial willingness to forgive, forget and legalize. Only in case the curative act attempts to validate that which could not have been originally authorized, or to validate action which impairs the obligation of contract or interferes with created rights will courts declare the statute unconstitutional." *Id.*, Sec. 2217, *Cf.* Sec. 2214.

The principles underlying curative legislation have been long recognized and embraced by the Maryland courts as well as this Court. *Leonardo* v. *Board of County Com'rs. of St. Mary's County*, 214 Md. 287, 301-302, 134 A.2d 284, 290-291 (1957), *cert. den.* 355 U.S. 906, 78 S.Ct. 332 (1957), *reh. den.* 355 U.S. 967, 78 S.Ct. 534 (1958); *O'Brian* v. *Baltimore County*

Com'rs., 51 Md. 15, 24 (1879); *Charlotte Harbor & N.Ry. Co.* v. *Welles*, 260 U.S. 8, 11-12, 43 S.Ct. 3, 4 (1922); *Thomson* v. *Lee County*, 70 U.S. 327, 3 Wall. 327, 331 (1865). In *Charlotte Harbor & N.Ry. Co.*, it was said:

> "The general and established proposition is that what the Legislature could have authorized, it can ratify if it can authorize at the time of ratification. [citations] And the power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." 260 U.S. at 11-12, 43 S.Ct. at 4.

It also should be noted that in re-enacting the "public accommodations" law, the County Council provided that enforcement of the "public accommodations" laws shall be in accordance with the enforcement provisions of the "fair housing" laws. The re-enacted "public accommodations" law specified:

> "Sec. 77-11. Commission Panel on Public Accommodations; Authority; Enforcement procedures.
>
> (a) The Commission's Panel on Public Accommodations shall be selected and have the functions enumerated in Section 77-13(d), Chapter 19 of the Laws of Montgomery County 1968.
>
> (b) The Commission Panel on Public Accommodations shall have the authority and power enumerated in Section 77-16, Chapter 19 of the Laws of Montgomery County 1968, except that Section 77-16(a) thereof insofar as it applies to Sec. 77-11(b) herein shall be concerned with public accommodations in lieu of housing and real property matters.
>
> (c) The Commission Panel on Public Accommodations shall have the procedures for enforcement as enumerated in Section 77-17, Chapter 19 of the Laws of Montgomery County 1968."

Chapter 19 of the Laws of Montgomery County 1968 was the Council re-enactment of the "fair housing" laws in "legislative session" which was necessitated by the *Scull* decision. Chapter 19 of the Laws of Montgomery County 1968 was enacted on May 30, 1968, and became effective on August 15, 1968. The enforcement provisions of the re-enacted "public accommodations" law is a clear statutory ratification of the actions of the Human Relations Commission.

On November 4, 1969, the County Council for Montgomery County corrected a technical irregularity in the local Human Relations laws. It validated a defective exercise of its existing powers. There was no disturbance of, or interference with, vested rights or contractual obligations. The right, power and authority of the Montgomery County Council to enact the Human Relations laws was attacked, again, after the *Scull* technicalities were rectified. The attack failed in *Montgomery Citizens League* v. *Greenhalgh*, 253 Md. 151, 252 A.2d 242 (1969), wherein Chief Judge Hammond explained:

> "A fair housing or equal accommodation law currently must prima facie be regarded as a reasonable exercise in good faith of the public power to protect the peace and good order of the community and to promote its welfare and good government. While in *Scull* we went no further than to hold the fair housing law invalid and ineffective because not passed in legislative session, it was implicit in the discussion of the case and its background that we thought the County had the power to pass such a law if it did so according to the legislative processes imposed upon it by the General Assembly." 253 Md. at 162, 252 A.2d at 247-248.

The *Greenhalgh* decision has an excellent evaluative review to the history of *Scull* and how it came to pass

that the County Council had utilized "executive sessions" for enacting the "fair housing" and "public accommodations" laws instead of "legislative sessions." 253 Md. at 155, 252 A.2d at 244.

The actions of the local agency as they affected the Respondents in early 1969 constituted no more than the transpiration of an administrative hearing. The Respondents were given notice of the administrative hearing and were afforded a complete opportunity to present witnesses, cross-examine witnesses, introduce evidence and oppose the introduction of evidence. All federal, state and county rights, constitutional and otherwise, were respected and safeguarded. What is particularly fatal to the Respondents' aspirations to exclusivity and privacy is that the agency had before it the *complete transcript* of the 1958 hearing before the Board of Appeals for Montgomery County wherein the Respondents sought their special exception.[2] This transcript documents the duplicity of the Respondents. The recorded testimony unequivocally demonstrates that the Respondent's unsuccessfully approached the County government for the construction of a community swimming pool, that in lieu of County action the Respondents initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

This *Amicus Curiae* has no doubt that the Respondents consider themselves, at this time, a private club.

[2] See Panel Finding No. 6, Apx. 4a of Brief on the Merits for Montgomery County, Maryland, as *Amicus Curiae*. The Transcript is 228 pages long.

Unfortunately for them, they made a commitment to the County and its citizens when they requested permission to construct and operate their swimming pool facility. The local zoning ordinance provides that a truly private swimming club can be constructed and operated. Section 111-37n of the Montgomery County Code 1965, as amended. There are such clubs in Montgomery County. The Respondents are not such a club. Their actions were conceived in "openness" and only with the advent of Negro neighbors have they sought to repudiate their commitments to the County and its citizenry.

II.

The Respondents Do Not Operate Their Pool Facility by Right, and Do Have a Commitment to Racial Indiscrimination

The Respondents claim that "[o]nce the requirements are met, a property owner has a prima facie right to enjoy a special exception." (Brief of Respondents, pp. 13-14). The case of *Rockville Fuel and Feed Co.* v. *Board of Appeals,* 257 Md. 183, 262 A.2d 499 (1970), is cited in support of this claim. It is upon this claim that the Respondents seek to convince this Court that the "special exception" under which they operate their swimming pool facility is held as a matter of *right* and that, therefore, they do not now have nor ever had a commitment to Montgomery County and its citizenry of racial indiscrimination. This claim is unfounded in law and fact, and is not supported by the case of *Rockville Fuel and Feed Co.* v. *Board of Appeals, supra.*

In Maryland, a special exception is a use which has been legislatively predetermined to be *conditionally* compatible with the uses permitted as of right in a particular zone. *City of Takoma Park* v. *County Board*

of Appeals for Montgomery County, 259 Md. 619, 621, 270 A.2d 772, 773 (1970) (and cases cited therein). Furthermore, the general rule in Maryland is that in reviewing the action of zoning boards a court will not substitute its judgment for the judgment of the board unless its action is shown to be arbitrary, capricious or illegal. And if the questions involved are fairly debatable and the facts presented are sufficient to support the board's decision it must be upheld. Moreover, conditions upon which a special exception may be granted are set out in the ordinance, and the board is given a wide latitude of discretion in passing upon special exceptions so long as the resulting use is in harmony with the general purpose and intent of the zoning plan and will not adversely affect the use of neighboring properties and the general plan of the neighborhood as provided in the zoning ordinance. *City of Takoma Park* v. *County Board of Appeals for Montgomery County, supra,* 259 Md. at 626, 270 A.2d at 775; *Tauber* v. *County Board of Appeals for Montgomery County,* 257 Md. 202, 212, 262 A.2d 513, 518 (1970). Clearly the Montgomery County Board of Appeals, in granting and denying special exceptions, exercises a quasi-judicial function. The Board performs a discretionary rather than a ministerial task, and, in accordance with generally recognized rules, the Board and not a court has the authority to determine the facts which warrant the issuance of a special exception. 3 American Law of Zoning, *Special Permits,* Sec. 15.17 (1968).

As noted *supra, Rockville Fuel and Feed Co.* v. *Board of Appeals* [*of the City of Gaithersburg*], 257 Md. 183, 262 A.2d 499 (1970), does not support the Respondents' claim. In *Rockville Fuel and Feed Co.*

the Maryland Court of Appeals was dealing with the zoning statute of an incorporated municipality located within Montgomery County, Maryland. The case involved a special exception use which *by the city statute* was "permitted by right." 257 Md. at 262, 262 A.2d at 502. The county statute under which the Respondents operate their pool facility does not "permit by right" the use here in issue. Furthermore, the role of the city zoning board is not the same as that of the county zoning board. 257 Md. at 190-191, 262 A.2d at 503. In *Rockville Fuel and Feed Co.* the Court properly read the city statute as legislatively determining that the requirement of promoting the general welfare was met when the specified requirements of the statutory section there in issue were met. 257 Md. at 190, 262 A.2d at 503. The county law, as enunciated in Sections 111-35 and 111-36 of the Montgomery County Code 1965, as amended, and their predecessors are not comparable to the city statute.

The criteria applicable to *all* special exceptions in Montgomery County, Maryland, but not within most incorporated municipalities, are set forth in Section 111-35 of the Montgomery County Code 1965, as amended. *City of Takoma Park* v. *County Board of Appeals for Montgomery County, supra,* 259 Md. at 623, 270 A.2d at 773. The section provides:

> "A *special exception may be granted* when the Board, or the Director, as the case may be, finds from a preponderance of the evidence of record that:
>
> (1) The proposed use does not affect adversely the General Plan for the physical development of the District, as embodied in this Ordinance and in any Master Plan or portion thereof adopted by the Commission; *and*

(2) The proposed use at the location selected will not:

(a) *adversely affect the health and safety of residents or workers in the area;*

(b) overburden existing public services, including water, sanitary sewer, public roads, storm drainage, and other public improvements;

(c) *be detrimental to the use or development of adjacent properties or the general neighborhood;* nor change the character of the general neighborhood in which the use is proposed considering service required, at the time of the application, population density, character, and number of similar uses; and

(3) *The standards set forth for each particular use for which a special exception may be granted have been met.*

a. The applicant for a special exception shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Board or the Director." (emphasis added)

Particular importance must be given to the language of the statute which is emphasized because it is pursuant to provisions almost identical to these that the consideration of neighborhood swimming needs were committed to the care and trust of the Respondents in 1958. Section 111-36 of the County Code further provides, in addition to the requirements of Section 111-35, that the Board of Appeals, when appropriate, is empowered to add to the specific provisions enumerated other requirements that it may deem necessary in order to protect adjacent properties, the general neighbor-

hood, and the residents and workers therein. Section 111-36 also provides, in subsection f., that:

> f. In addition to the findings required in Sections 111-35 and 111-37, the following special exceptions may be granted when the Board or Director, as the case may be, *finds from a preponderance of the evidence of record that for the public convenience and service a need exists for the proposed use for service to the population in the general neighborhood considering the present availability of such uses to that neighborhood.*

(6) *Swimming pools, community. . . .*" (Emphasis added)

The law, as it existed when the Respondents were given their special exception, did not provide for automatic issuance, and did provide for consideration of community needs and service. It was within the intent and spirit of the law that the Board granted the Respondents' special exception and it was in acknowledgement of that intent and spirit that the Respondents sought to serve the needs of the community and their neighborhood; a service which the local governmental authorities were unable to provide. In 1958, the Respondents were committed to a policy of open indiscriminate membership. They cannot repudiate that policy now.

CONCLUSION

The Respondents seek to deride the participation of Montgomery County in these proceedings and impugn the proceedings and findings and order of one of its administrative agencies. Montgomery County is no mere interloper. The controversy which gives rise to these proceedings began in early 1969 before the Montgomery County Commission on Human Relations. It was only after the administrative proceedings that fed-

eral litigation was instituted. The hearing before the County agency dealt with the entire history of the Wheaton-Haven swimming pool, beginning with the Respondents' application for a special exception to construct and operate the pool. The agency afforded all parties an opportunity to be heard and present their cases. There were no "Star Chamber" proceedings. This controversy is only the third controversy which has necessitated that court action be instituted in order to bring a public accommodation into compliance with the local laws. The action and decision of the administrative agency is entitled to a presumption of validity, regularity, and full probative value. *F.C.C.* v. *Schreiber,* 381 U.S. 279, 85 S.Ct. 1459 (1965); *U.S.* v. *Chemical Foundation,* 272 U.S. 1, 47 S.Ct. 1 (1926); *Lerch* v. *Maryland Port Authority,* 240 Md. 438, 214 A.2d 761 (1965); *Heaps* v. *Cobb,* 185 Md. 372, 45 A.2d 73 (1945). And the agency's "Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order" is entitled to appellate judicial notice. *N.L.R.B.* v. *E. C. Atkins & Co.,* 331 U.S. 398, 67 S.Ct. 1265 (1947), *reh. den.* 331 U.S. 868, 67 S.Ct. 1725 (1947); *Tempel* v. *U.S.,* 248 U.S. 121, 39 S.Ct. 56 (1918); *Martin* v. *Norris,* 188 Md. 330, 52 A.2d 470 (1947). The document does accurately relate the operative factual background which is dispositive of the question of exclusivity and privacy. It testifies to the Respondents' aspirations to racial discrimination only after Negroes began to move into their neighborhood. It demonstrates that the recognized elements of exclusivity were never present in the activities of Wheaton-Haven Recreation Association, Inc. until it embraced a policy of racial segregation *post-factum.*

For all the foregoing reasons and the reasons set forth in its Brief on the Merits, *Amicus Curiae,* Mont-

gomery County, Maryland, respectfully submits that Wheaton-Haven Recreation Association, Inc. is not entitled to circumvent the provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) as a private club, and, accordingly, the judgments of the lower courts should be reversed.

Respectfully submitted,

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